APPEAL NO. 060132
FILED MARCH 10, 2006

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). A contested case hearing (CCH) was held on December 5, 2005, with the record closing on December 14, 2005. The only issue before the hearing officer was:

> Did the first certification of maximum medical improvement [MMI] and assigned impairment rating [IR] from [Dr. S], dated October 28, 2004, with a 0% [IR] become final under Texas Labor Code Section 408.123?

The hearing officer determined that the "first certification did not become final because of inadequate treatment for the compensable injury."

The appellant (carrier) appealed, contending that the compensable injury was a sprain and "there was no misdiagnosis and no explanation as to how physical therapy, medications, and a gradual return to work full duty equates [to] inadequate treatment." The respondent (claimant) responds, urging affirmance because there was compelling medical evidence of "a previously undiagnosed medical condition" and that she "received inadequate medical treatment."

DECISION

Reversed and remanded.

The claimant was employed as a personal trainer and "dance boot camp instructor" at a fitness center. The parties stipulated that the claimant sustained a compensable injury on ___, that Dr. S, the treating doctor, certified that the claimant reached MMI on October 28, 2004, with a zero percent IR, and that the claimant did not dispute the first certification (Dr. S's October 28, 2004 certification) within 90 days.

The evidence indicates that the claimant sustained a low back injury on ___, pulling on a "45 pound plate" and went to a hospital emergency room the same day. The claimant was diagnosed with a lumbar sprain/strain and was referred to Dr. S. Progress reports dated from June 17 through October 28, 2004, reflect a diagnosis of a lumbar sprain/strain, lumbar x-rays "unremarkable without acute injury" and a progression of conservative care, medication and supervised physical therapy. The claimant was released to return to work with restrictions on August 23, 2004, and then released to full duty without restriction on October 28, 2004. Dr. S certified MMI on October 28, 2004, with a zero percent IR. The parties stipulated that the claimant did not dispute that certification within 90 days. The claimant returned to work. Whether the claimant returned to full duty is disputed but in any event the claimant did not seek additional medical care until April 4, 2005, when she returned to Dr. S. Dr. S noted "recently progressive symptoms," diagnosed lumbar sprain/strain and lumbar radiculitis

and commented "that there may now be some component of nerve impairment, not previously recognized, but caused by a disc protrusion or herniation." Dr. S ordered an MRI which was performed on April 10, 2005. The MRI had an impression of disc desiccation and a 3 mm broad-based bulge at L1-2 and a disc bulge at L4-5 with "mild contact of the existing L4 nerve root on the left."

Section 408.123(d) provides that except as provided in Subsections (e), (f), and (g), the first valid certification of MMI and the first valid assignment of IR to an employee is final if the certification of MMI or assignment of an IR is not disputed within 90 days. Section 408.123(f) (formally Section 408.123(e)) provides that the first certification of MMI or assignment of an IR may be disputed after the 90-day period if there is "compelling medical evidence" establishing, among other exceptions:

> (B) clearly mistaken diagnosis or a previously undiagnosed medical condition; or
>
> (C) improper or inadequate treatment of the injury before the date of the certification or assignment that would render the certification or assignment invalid; or
>
> (2) other compelling circumstances exist as prescribed by commission rule.

Dr. S, in a letter dated May 24, 2005, entitled Appeal of MMI/IR states that the letter is in support of the claimant's request to appeal and rescind her previously determined MMI and IR, recites his treatment of the claimant and concludes "it is my recommendation that my previous assessment of [MMI] dated 10/28/04, be rescinded based on the premise of inadequate treatment of the patients original injury." Dr. S provides no clue regarding how he believed his treatment was inadequate and the letter, in fact, recites quite adequate treatment of the lumbar strain/sprain before the date of the certification. The hearing officer seeks to address the adequacy or inadequacy of treatment, by commenting in the Background Information:

> It appears from the evidence that Claimant received inadequate treatment from [Dr. S] before he certified that she was at MMI. Despite the severity of her symptoms, such as the fall to the floor and an inability to get up, [Dr. S] did not order an MRI of the lumbar spine before he certified that she was at MMI.

The hearing officer then found that Dr. S "failed to order appropriate diagnostic tests before he certified that Claimant was at MMI" and that Dr. S "provided inadequate treatment for Claimant before he certified that she was at MMI."

There is no medical evidence, much less compelling medical evidence required by Section 408.123(f), that failing to order an MRI for a back sprain which caused claimant to fall to the floor and unable to get up constituted improper or inadequate treatment. Dr. S, in a letter designed to assist the claimant's "appeal" only recites that

his previous assessment of MMI be rescinded "based on the premise of inadequate treatment" without indicating how he believed his treatment was improper or inadequate. Further there is no medical evidence to suggest what other "appropriate diagnostic tests" should have been ordered before October 28, 2004, given that the claimant did have x-rays, physical therapy and was "doing okay." We hold that the hearing officer's determination that the first certification did not become final because of inadequate treatment is not supported by the evidence. *See also* Appeals Panel Decision (APD) 052666-s, decided February 1, 2006. Accordingly, we reverse the hearing officer's determination that the first certification did not become final because of inadequate treatment.

However, the claimant at the CCH proceeded on a dual theory of exceptions of not only inadequate treatment but also on the basis of "an undiagnosed medical condition" (TR pg 8) or "a clearly mistaken undiagnosed or a previously undiagnosed condition." (TR pg 34). The carrier's appeal also urges that "there was no misdiagnosis." The claimant in her response urges affirmance on the basis of "a previously undiagnosed medical condition" in addition to inadequate treatment. The hearing officer failed to address the exception in Section 408.123(f)(1)(B), a clearly mistaken diagnosis or a previously undiagnosed medical condition. We remand the case back to the hearing officer for findings and a determination on the clearly mistaken diagnosis or a previously undiagnosed medical condition exception. No evidentiary hearing on remand is necessary. The hearing officer may, at her discretion, accept written and or oral comment from the parties regarding the mistaken diagnosis or previously undiagnosed medical condition exception only.

Pending resolution of the remand, a final decision has not been made in this case. However, since reversal and remand necessitate the issuance of a new decision and order by the hearing officer, a party who wishes to appeal from such new decision must file a request for review not later than 15 days after the date on which such new decision is received from the Texas Department of Insurance, Division of Workers' Compensation pursuant to Section 410.202 which was amended June 17, 2001, to exclude Saturdays and Sundays and holidays listed in Section 662.003 of the Texas Government Code in the computation of the 15-day appeal and response periods. *See* APD 92642, decided January 20, 1993.

The true corporate name of the insurance carrier is **SENTRY INSURANCE, A MUTUAL COMPANY** and the name and address of its registered agent for service of process is

TREVA DURHAM
1000 HERITAGE CENTER CIRCLE
ROUND ROCK, TEXAS 78664-4463.

_____
Thomas A. Knapp
Appeals Judge

CONCUR:

_____
Robert W. Potts
Appeals Judge

_____
Margaret L. Turner
Appeals Judge